

NOTES

BOARDING UP THE FAIR HOUSING ACT: TIME BARRING DESIGN AND CONSTRUCTION CLAIMS FOR HANDICAPPED INDIVIDUALS

MATTHEW R. FARLEY*

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* J.D., 2010, University of Richmond School of Law; B.A., 2007, University of Mary Washington.

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I. INTRODUCTION

*There is one kind of robber whom the law does not strike at, and who steals what is most precious to men: time.*¹

—Napoleon I

Title VIII of the Civil Rights Act of 1968, otherwise known as the Fair Housing Act (FHA), prohibits discrimination in the sale, rental, and financing of residential dwellings based on race, color, religion, or national origin.² In 1988, Congress passed the Fair Housing Amendments Act (FHAA), which incorporated disability and family composition as prohibited housing criteria.³ The addition of disabled persons as a protected class presented unique difficulties, which Congress addressed in the

1. NAPOLEON BONAPARTE, *MILITARY MAXIMS OF NAPOLEON BONAPARTE* (1815).

2. Civil Rights (Fair Housing) Act of 1968, 42 U.S.C. §§ 3601–3619, 3631 (2006).

3. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. §§ 3601–3619, 3631 (2006)).

FHAA.⁴ Specifically, Congress took measures to attend to the distinctive structural discrimination the disabled may face, unlike other covered classes.⁵ That is, because the disabled are susceptible to discrimination that may be inherent in the design or construction of a residential structure (as apart from sale, rental, or acquisition), Congress enacted provisions making certain design features unlawful.⁶ These design and construction provisions differ slightly from the requirements of other legislation,⁷ and compliance is usually monitored and directed by the United States Department of Housing and Urban Development (HUD).⁸

The addition of the FHAA design and construction provisions is in accord with the FHA's broad remedial purpose "to provide, within constitutional limitations, for fair housing throughout the United States."⁹ Despite the design and construction provisions of FHA § 804(f)(3)(C), many residential dwellings are currently designed and constructed in substantial noncompliance with the FHAA's mandate and the accessibility guidelines promulgated by HUD.¹⁰ At least one commentator has sug-

4. See H.R. REP. NO. 100-711, at 17-32 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2178-93.

5. H.R. REP. NO. 100-711, at 18-19 n.28, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2178-79 n.28.

6. See Fair Housing Act (FHA) § 804(f)(3)(C), 42 U.S.C. § 3604(f)(3)(c)(2006). Section 804 is codified at 42 U.S.C. § 3604. This Note adheres to the common practice by referring to the section by its public law designation.

7. For example, Title III of the Americans with Disabilities Act (ADA) requires the removal of architectural barriers in existing facilities, whereas the Fair Housing Act (FHA) does not. See Americans with Disabilities Act 42 U.S.C. §§ 12182(a), (b)(2)(A)(iv) (2006) (mandating the removal of structures hindering the mobility of disabled persons in public accommodations "where such removal is readily achievable.").

8. The United States Department of Housing and Urban Development (HUD) is responsible for enforcing compliance with the FHA and FHAA, among other laws. FHA § 808(a). HUD may independently file a complaint against a building owner, architect, contractor, or other individual involved in the design or construction of a qualifying dwelling. See *id.* § 810(a)(1)(A)(i).

9. *Id.* § 801 (declaring the purpose and goals of the fair housing policy).

10. See, e.g., OFFICE OF POLICY DEV. AND RESEARCH, U.S. DEP'T OF HOUS. AND URBAN DEV., DISCRIMINATION AGAINST PERSONS WITH DISABILITIES: BARRIERS AT EVERY STEP 3, 42, 51 (2005), *available at* http://www.huduser.org/publications/pdf/DDS_Barriers.pdf (providing examples of FHAA noncompliance by property owners in a Chicago, Illinois field study). Disabled rental customers seeking new housing in Chicago or the surrounding area of Cook County are not permitted to inspect the unit thirty percent of the time due to inaccessibility. *Id.* at 42. Additionally, disabled persons are often prohibited from making modifications which are necessary to utilize the entirety of the accommodation. *Id.* at 3. "Almost one of every six housing providers who indicated that units were available refused to allow reasonable unit modifications needed by wheelchair users. And [nineteen] percent of those with on-site parking refused to make the reasonable accommodation of providing a designated accessible parking space for a wheelchair user." *Id.* at 3; see also OFFICE OF POLICY DEV. AND RESEARCH, U.S. DEP'T OF HOUS. AND

gested that the continued noncompliance is substantially attributable to the sluggish and mixed judicial interpretation of how the FHA's statute of limitations applies to design and construction cases.¹¹ Indeed, federal courts of appeals have rarely had the opportunity to address this issue despite the integral role of the FHA, and district courts are sharply divided.¹² The problem is (perhaps deceptively) easily stated: When does the statute of limitations begin to run in FHA claims against the architect or builder of a noncompliant structure? Does the statute run for an architect when the schematics are completed and passed on to the contractor? Or must the structure be physically complete for the statute to run?¹³ Alternatively, must the units at issue be occupied prior to the statute of limitations running, and, if so, to what degree?

The answer to this issue and the numerous questions it invokes is dramatically important to disabled individuals. If the judicial response is that the limitations period begins to run on the completion of the design or construction period, then disabled individuals may be without recourse despite promptly filing suit upon discovering or encountering a noncompliant residence. On the other hand, if the response is that the limitations period does not commence until a plaintiff discovers or encounters an instance of noncompliance, then architects and builders will be perpetually exposed to liability—at least for as long as the noncompliant feature exists. Recent litigation on this topic has manifested at least three distinct

URBAN DEV., MULTIFAMILY BLDG. CONFORMANCE WITH THE FAIR HOUS. ACCESSIBILITY GUIDELINES 16–51 (2003), available at <http://www.huduser.org/publications/pdf/multi-family.pdf> (discussing the HUD accessibility guidelines and the statistical analysis utilized to develop these guidelines).

11. See Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in "Design and Construction" Cases Under the Fair Housing Act*, 40 U. RICH. L. REV. 753–55 (2006) (attributing confusion among noncompliant builders and owners to a inconsistent interpretation of the statute of limitations under FHA § 804(f)(3)(C)). Occasionally, courts have decided in favor of defendants asserting a statute of limitations defense by applying a statute of repose approach. *Id.* at 755. These courts ignore the requirements of § 804(f)(3)(C) and encourage illegally constructed buildings by the multi-family housing industry. *Id.*

12. Only two Circuits, the Sixth and the Ninth, have interpreted the FHA's statute of limitations, and they reached different results. See *Garcia v. Brockway*, 503 F.3d 1092, 1101 (9th Cir. 2007) (holding continuing violations did not toll statute of limitations), *cert. denied sub nom.*, *Thompson v. Turk*, 129 S. Ct. 724 (2008); *Fair Hous. Council, Inc. v. Vill. of Olde St. Andrews, Inc.*, 210 Fed. Appx. 469 (6th Cir. 2006) (holding continuing violations tolled statute of limitations), *cert. denied sub nom.*, *WKB Assocs., Inc. v. Fair Hous. Council, Inc.*, 552 U.S. 1130 (2008). The Supreme Court of the United States denied certiorari in both appeals, presumably due to the perception that the issue is not ripe for appeal to the nation's highest court.

13. The notion of structural "completeness" can also be further dissected: Is a building complete when the last brick is laid? When the landscaping is completed? When the first tenant takes occupancy? When the last certificate of occupancy is issued?

outcomes,¹⁴ the discussion of which is the topic of this Note. Part II details the relevant portions of the FHA and FHAA, and discusses design and construction cases generally. Part III reviews the first of the three judicial responses to the limitations question: the discovery rule. Part IV reviews the second response: the continuing violations doctrine. Part V reviews the final response, a bright line rule which I have coined strict limitations, and discusses the most recent decision on point: *Garcia v. Brockway*.¹⁵

II. THE FAIR HOUSING ACT

A. General Provisions of the FHA and FHAA

The FHA as amended requires equal housing opportunities for all, regardless of “race, color, religion, sex, familial status, . . . national origin” or disability.¹⁶ The FHA applies to single-family dwellings in certain circumstances¹⁷ and multi-family dwellings with few exceptions.¹⁸ As applied to individuals with disabilities, the FHA prohibits discrimination in the sale or rental, or discrimination in the terms of the sale or rental because of disability.¹⁹ The FHA also requires residential owners or sellers

14. See Parts III–V of this Note.

15. 503 F.3d 1092 (9th Cir. 2007) (holding that the statute of limitations begins when the design and construction phase is completed), *cert. denied sub nom.*, *Thompson v. Turk*, 129 S. Ct. 724 (2008).

16. Fair Housing Act § 804(a), (f), 42 U.S.C. § 3604(a), (f) (2006).

17. If a single-family dwelling is sold or rented without the use of a broker and the “private individual owner does not own more than three such single-family houses at any one time,” then the FHA does not apply. *Id.* § 803(b)(1).

18. The FHA covers apartments, condominiums, and other multi-family dwellings unless the dwelling is owner-occupied and contains no more than four units (housing four families residing independently of one another). *Id.* § 803(b)(2).

19. *Id.* § 804(f)(1)–(2) (barring discrimination in the sale or rental of a dwelling to any person because of a handicap). The relevant portion of the statute prohibits discrimination based on a disability of:

- (A) that buyer or renter,
- (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
- (C) any person associated with that buyer or renter.

Id. Furthermore, the statute provides that it is unlawful

To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—

- (A) that person; or
- (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
- (C) any person associated with that person.

Id.

to make reasonable accommodations for disabled individuals and to permit reasonable modification to individual dwelling units or common areas.²⁰ Finally, and perhaps most importantly, the FHA defines discrimination broadly, to include design and construction features that hinder accessibility for disabled tenants or buyers.²¹

The FHA provides three distinct methods of enforcement and remedy, each separate from the others, and thus they are able to be employed concomitantly. First, an individual aggrieved²² by a discriminatory housing practice can file a complaint with HUD.²³ This method usually leads

20. *Id.* § 804(f)(3)(A)-(B) (defining what constitutes discrimination under the statute). For purposes of the FHA, discrimination includes:

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling

Id.

21. *Id.* § 804(f)(C) (construing discrimination broadly to include various design and construction features that impede the mobility and accessibility of disabled tenants). The statute further defines discrimination as including a refusal to design and construct buildings in such a way that:

(i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings contain the following features of adaptive design:

(I) an accessible route into and through the dwelling;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(III) reinforcements in bathroom walls to allow later installation of grab bars; and

(IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

Id.

22. An aggrieved person is defined as “any person who (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur.” Fair Housing Act § 802(i), 42 U.S.C. § 3602(i) (2006).

23. *Id.* § 801(a)(1)(A)(i) (providing that an aggrieved person may file a complaint with the Secretary of HUD). Enforcement through HUD can also take place pursuant to the Secretary’s own initiative. *Id.*; see also *Garcia v. Brockway*, 503 F.3d 1092, 1095 (9th Cir. 2007), *aff’d en banc*, 526 F.3d 456 (9th Cir. 2008) (noting that while “HUD may also

to an administrative hearing.²⁴ Second, an aggrieved individual can seek the assistance of the Attorney General, who is authorized to bring suit when a pattern or practice of discrimination is apparent.²⁵ Third, an aggrieved individual is entitled to bring a civil claim in federal or state court without pursuing either of the aforementioned remedial measures.²⁶ The last of these enforcement provisions, private civil suits brought in federal or state court by aggrieved individuals, is the main focus of this Note.²⁷

B. *Design and Construction Cases*

The design and construction requirements of the FHA apply only to housing constructed after March 13, 1991.²⁸ The FHA specifically requires residences to be designed and constructed with accessible common areas;²⁹ handicapped-functional doors;³⁰ “an accessible route into and through the dwelling;”³¹ accessible outlets, light switches, and environmental controls;³² bathroom wall reinforcements to allow for future grab bar installation;³³ “and usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.”³⁴ HUD has also interpreted the statute as including a seventh requirement: that the building have accessible entrances and an accessible route to each unit.³⁵ Ar-

file a complaint *sua sponte*; it’s unclear whether HUD is subject to the same limitations period.”).

24. Section 810 governs preliminary matters, including pleadings, conciliation agreements, and service. FHA § 810(a)(1)(A)(ii).

25. *Id.* § 814(a)-(b) (permitting the Attorney General to initiate a civil action against any discriminating party in violation of the statute). If reasonable cause supports the belief that a person or persons are infringing upon the FHAA rights of any individual or group of individuals and that the denial of these rights gives rise to “an issue of general public importance,” then the Attorney General is authorized to file suit in U.S. district court. *Id.*

26. *Id.* § 813(a)(1)(A).

27. The first method, an administrative hearing before HUD, tolls the statute of limitations for private suits. *Id.* § 813(a)(1)(B). The limitations period for bringing an administrative suit is one year. *Id.* § 810(a)(1)(A)(i). The second method, suit by the Attorney General, has no statute of limitations. *See id.* § 814. Limiting the focus of this paper to the two-year statute of limitations in private civil suits serves to streamline the issue.

28. Fair Housing Act § 804(f)(3)(C), 42 U.S.C. § 3604(f)(3)(c) (2006).

29. *Id.* § 804(f)(3)(C)(i).

30. *Id.* § 804(f)(3)(C)(ii).

31. *Id.* § 804(f)(3)(C)(iii)(I).

32. *Id.* § 804(f)(3)(C)(iii)(II).

33. Fair Housing Act § 804(f)(3)(C)(iii)(III).

34. *Id.* § 804(f)(3)(C)(iii)(IV).

35. Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. 9472, 9503 (Mar. 6, 1991) (to be codified at 24 C.F.R. Ch. I). For an abridged and concise version of the HUD design requirements, see OFFICE OF FAIR HOUS. AND EQUAL OPPORTUNITY, U.S. DEP’T OF HOUS. AND URBAN DEV., FAIR HOUSING ACT DESIGN MANUAL 14 (1998) *available at* <http://www.huduser.org/publications/pdf/fairhousing/fairfull.pdf> (outlining briefly the seven

chitects and builders whose designs and structures fail to meet these standards may be subject to liability under the FHA.³⁶

Perhaps the single most troublesome aspect of design and construction claims for disabled plaintiffs is the statute of limitations.³⁷ The FHA's statute of limitations for private citizen suits, including design and construction claims, provides that:

An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years³⁸ after the occurrence or termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter,³⁹ whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.⁴⁰

In the vast majority of cases, this statute of limitations needs no judicial interpretation. The typical FHA case turns on a discrete act of discrimi-

building requirements which regulate the construction of new buildings and dwelling units); *see Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984) (holding that reasonable administrative agency's reading of organic statute should be deferred to if the statute is ambiguous and the agency interpretation is reasonable).

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Id. at 843–44; *see also* H.R. REP. NO. 100-711, at 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179 (outlining requirements and rationale behind the FHAA).

[The FHAA] requires that in the future . . . doors and hallways must be wide enough to accommodate wheelchairs, switches and other controls must be in convenient locations, most rooms and spaces must be on an accessible route, and disabled persons should be able to easily make additional accommodations if needed, such as installing grab bars in the bathroom, without major renovation or structural change.

Id. In light of the *Chevron* doctrine, this interpretive rule will likely be given the utmost deference by Article III courts. *See Chevron*, 467 U.S. at 837 (enunciating the standard of review for certain agency determinations).

36. Fair Housing Act § 804(f)(3)(C), 42 U.S.C. § 3604(f)(s)(c) (2006).

37. Of course, other difficulties exist for design and construction cases. Of particular note, plaintiff standing—particularly organizational plaintiffs—and successor liability present significant complexities. *See* Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in "Design and Construction" Cases Under the Fair Housing Act*, 40 U. RICH. L. REV. 753, 781–86, 813–33, 859–63 (2006).

38. The FHAA extended the limitations period for private suits to two years, whereas before it was only 180 days. H.R. REP. NO. 100-711, at 39 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2200.

39. *See* FHA § 810(a)-(b) (2006) (detailing such conciliation agreements).

40. *Id.* § 813(a)(1)(A) (footnotes added).

nation, upon which the limitations period begins to run.⁴¹ However, the addition of the design and construction requirements of § 804(f)(3)(C) complicated the determination of an appropriate triggering event for the limitations period. The difficulty lies in determining when “the occurrence or the termination of an alleged discriminatory housing practice”⁴² transpires when the alleged discriminatory practice is a design and construction defect.

III. THE DISCOVERY RULE

A. *The Functions of Statutes of Limitations*

Statutes of limitations hedge the time available for plaintiffs to assert a claim for relief.⁴³ The key rationale behind statutes of limitations is to prevent unfairly stale claims from being brought against unsuspecting defendants.⁴⁴ The law ultimately aspires to uncover the truth by providing a structure within which plaintiffs and defendants may substantiate their respective positions with evidentiary support.⁴⁵ Over time, the evidentiary path to the truth begins to deteriorate as evidence dissipates, memories fade, and witnesses disappear.⁴⁶ Another primary rationale of statutes of limitations is to provide repose so that defendants may rely on the expectation that occurrences in the distant past are settled.⁴⁷ Stated

41. For example, the owner of a residential dwelling who denies occupancy to an interracial couple while offering occupancy to a single white female engages in an act of discrimination on the date the interracial couple is denied housing. *Id.* § 810(a)(1)(A)(i). The limitations period commences instantly. *See id.* (stating that a victim of discrimination must file a complaint “not later than one year after an alleged discriminatory housing practice has occurred or terminated”).

42. *Id.* § 813(a)(1)(A).

43. *See Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950) (explaining the underlying principle behind a statute of limitations).

44. *See, e.g.,* Order of R.R. Tel. v. Ry. Express Agency, 321 U.S. 342, 348–49 (1944) (“Statutes of limitation, . . . promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.”).

45. *See id.*

46. *See id.*

47. *See, e.g.,* United States v. Kubrick, 444 U.S. 111, 117 (1979) (noting that statutes of limitation protect against uncertain judgments resulting from evidence whose dependability and truth yielding value has depreciated over time). Specifically, the Court reasons that statutes of limitation “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence.” *Id.* The goal of protecting the search for the truth from undependable evidence has less traction in the context of litigating whether a design or construct is discriminatory in multifamily dwellings, because the discriminating quality of a design or construct will often be patently obvious. However, the ability to ascertain who is responsible for the design or construction of the offending violation could depreciate due to the passing of time.

differently, in addition to protecting the truth from stale evidence, statutes of limitations protect the defendant from unnecessarily elongated lapses in the initiation of litigation. Finally, statutes of limitations promote judicial economy and efficiency by restricting claims to those in the recent past. While courts have acknowledged that the primary purpose of statutes of limitations is to prevent stale claims, the repose that defendants are offered, while perhaps incidental, serves to discharge liability.⁴⁸

B. *What is the Discovery Rule?*

While statutes of limitation are normally triggered by the occurrence of a prohibited event or action, the discovery rule calls for a limitations period to run only once “the plaintiff discovers (or reasonably should have discovered) the injury giving rise to the claim.”⁴⁹ The discovery rule essentially “shields a plaintiff from the accrual of a cause of action until he or she discovers, or by an exercise of reasonable diligence and intelligence should have discovered, that he or she may have an actionable claim.”⁵⁰ Some statutes of limitations expressly incorporate the discovery rule;⁵¹ others contain language that courts have held to implicitly invoke the discovery rule.⁵²

The conceptual interpretation of the discovery rule has been mixed. While some courts and commentators have asserted that the discovery

48. See *Goad v. Celotex Corp.*, 831 F.2d 508, 511 (4th Cir. 1987) (1988) (“Statutes of limitation . . . are primarily instruments of public policy and of court management, and do not confer upon defendants any *right* to be free from liability, although this may be their *effect*.”) (emphasis added) (footnotes omitted).

49. BLACK’S LAW DICTIONARY 499 (8th ed. 2004). Typically, the discovery rule arises in situations where the injury is inherently difficult to detect. *Id.*

50. 51 AM. JUR. 2D *Limitation of Actions* § 179 (2006) (discussing the fundamental tenets of the discovery rule).

51. See, e.g., 28 U.S.C. § 2416(c) (2006) (statute of limitations for actions by the United States is tolled for as long as “facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances”).

52. See, e.g., *Kubrick*, 444 U.S. at 113 (holding the term “accrual” in the Federal Tort Claims Act indicated that Congress intended application of the discovery rule). *Kubrick* involved a plaintiff bringing a claim under the Federal Tort claims act for injuries sustained during treatment in a Veterans’ Administration hospital. *Id.* at 113–14. In applying the discovery rule, the Court distinguished between discovery of the plaintiff’s injury and discovery of the *cause* of his injury. *Id.* at 122. The Court held that accrual of a claim did not require the plaintiff to know that his injury was negligently caused; only that he was aware of his injury. *Id.* at 123; *Bi-State Dev. Co. v. Shafer, Kline & Warren, Inc.*, 990 P.2d 159, 518–19 (Kan. Ct. App. 1999) (requiring injury to be “reasonably ascertainable” for the statute of limitations period to begin).

rule is a means of tolling a limitations period,⁵³ others have claimed that the discovery rule determines when the plaintiff's underlying, substantive claim accrues.⁵⁴ Although the distinction is an important one for aggrieved plaintiffs,⁵⁵ both interpretations protect the right of action of an ignorant plaintiff, and so the difference is ignored for purposes of this Note.

C. *The Rationale for the Discovery Rule*

Courts are often more willing to apply the discovery rule in cases involving a claim which is unusually difficult to detect.⁵⁶ This is a main rationale for the discovery rule; namely, that it is unfair to deny an innocent and ignorant plaintiff relief when a defendant violates the law and wrongs the plaintiff. This justification for the discovery rule is an affirmation of the policy underlying statutes of limitation in the first place. If statutes of limitation are designed to prevent plaintiffs from sleeping on their rights, then the discovery rule is a safety valve of sorts, providing

53. See, e.g., *Cal. Sansome Co. v. U.S. Gypsum Co.*, 55 F.3d 1402, 1406 (9th Cir. 1995) (explaining that "[t]he 'discovery rule,' . . . assumes that the elements of accrual including harm exist, but tolls the ruling of the statute until the plaintiff is on inquiry notice of its injury (and its wrongful cause)."). The burden of proof is on the party claiming the delay in the discovery of the injury. *Id.* More specifically, the plaintiff is required "to plead and prove the facts necessary to toll the limitations period once it is established that it would have otherwise commenced." *Id.*

54. See, e.g., *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990) (explaining that a cause of action can sometimes accrue when it is discovered, even if it is after the injury has occurred). In this age discrimination case, the court determined that if the plaintiff did not realize his injury until the day he was terminated, "the statute of limitations did not begin to run till that day and his suit is not time-barred." *Id.*

55. See James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 VA. ENVTL. L.J. 589, 597 (1996) (distinguishing between the discovery rule and the concept of tolling). It is conceptually helpful to understand that "[t]olling is an equitable means of suspending application of a statute of limitations where a claim has already accrued and the limitations period has already started to run." *Id.* On the other hand, the application of the discovery rule has the effect of postponing the very accrual of the cause of action. *Id.* Therefore, the discovery rule is different in that it preserves the plaintiff's ability to benefit from the entire limitations period, rather than merely benefit from the portion still remaining after the statute is tolled. *Id.*

56. See *Geo. Knight & Co. v. Watson Wyatt & Co.*, 170 F.3d 210, 213 (1st Cir. 1999) (holding that for a statute of limitations to be tolled pursuant to the discovery rule, the cause of action must have been "inherently unknowable" when the injury occurred); see also 51 AM. JUR. 2D *Limitation of Actions* § 179 (2000) (explaining that the discovery rule applies "only if the nature of the injury is inherently undiscoverable.").

equitable relief for plaintiffs who did not know they had a right to sleep on it in the first place.⁵⁷

A second justification for the discovery rule has already been touched upon: the plain language of a statute may expressly or implicitly call upon some form of the discovery rule.⁵⁸ Statutes which define a cause of action as dependent on the plaintiff's discovery are clearly employing the discovery rule. Statutes that have been interpreted as implicitly or impliedly using the discovery rule are not as easy to recognize, and they are not uniformly interpreted. The analysis of one court is informative on the construction of statutory language, and how that interpretation informs the application of the discovery rule when not expressly employed:

The Fourth Circuit refused to apply the discovery rule [in an age discrimination case] because the statutory language of the [Age Discrimination Employment Act] clearly and unambiguously states that the clock begins to run from the *occurrence* of the violation, not its *discovery*, or . . . its *accrual*.⁵⁹ . . . Conversely, the Fourth Circuit has applied the discovery rule where the statutory language is ambiguous or vague and employs such key words as "*accrues*" or "*arises*."⁶⁰

In other words, statutory language implicating a discrete act or occurrence will usually be construed as omitting the discovery rule. Conversely, statutory language mentioning the "accrual" or "arising" of a claim is typically interpreted as appealing to the discovery rule.

A final—and not wholly independent—justification for the discovery rule is the notion of justice and equity in judicial administration. As one

57. See James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 VA. ENVTL. L.J. 589, 600–01 (1996) (concluding that "the discovery rule is consistent with the primary policy of statutes of limitations of discouraging stale, dilatory lawsuits because a plaintiff who has not discovered the basis for the claim cannot bring it any more promptly.").

58. See, e.g., 28 U.S.C. § 2416(c) (2006) (statute of limitations for actions brought by the United States is tolled for as long as "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances"); *United States v. Kubrick*, 444 U.S. 111, 113 (1979) (applying the discovery rule to a plaintiff bringing a medical malpractice claim); *Bi-State Devel. Co. v. Shafer, Kline & Warren, Inc.*, 990 P.2d 159, 518–19 (1999) (requiring an injury to be "reasonably ascertainable" before the limitations period begins). The court determined that the statute of limitations barred Bi-State's negligence claim because the injury became "reasonably ascertainable" the day the easement was executed and recorded as a public record. *Id.* at 519.

59. *Moeske v. Miller & Smith Inc.*, 202 F. Supp. 2d 492, 509 (E.D. Va. 2002) (citing *Hamilton v. 1st Source Bank*, 928 F.2d 86, 87–89 (4th Cir. 1990)) (emphasis added).

60. *Id.* (citing *Nasim v. Warden*, 64 F.3d 951, 955 (4th Cir. 1995) and *Hamilton v. 1st Source Bank*, 928 F.2d 86, 87–89 (4th Cir. 1990)) (emphasis added) (footnotes omitted).

court aptly wrote, “To say to one who has been wronged, ‘You had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy,’ makes a mockery of the law.”⁶¹

D. *The Discovery Rule and Design and Construction Claims*

1. Positive Treatment of the Discovery Rule

Courts have rarely applied the discovery rule to FHA design and construction claims. In the few instances where the discovery rule has been addressed, examination of the discovery rule has generally been either cursory or negative.⁶² Positive or neutral discussion of the discovery theory as applied to the FHA is limited to two district court cases, and both were ultimately decided on the continuing violations doctrine rather than the discovery rule.⁶³ Despite this, both cases acknowledged the discovery rule, lending some credence to the rule’s availability in privately-brought design and construction cases.

In *Eastern Paralyzed Veterans Ass’n v. Lazarus-Burman Associates*, the plaintiffs brought suit against a developer alleging that that its housing project was not wheelchair accessible.⁶⁴ The defendants in *Eastern Paralyzed Veterans* urged use of the date on which the plaintiff “became aware of the defendants’ allegedly discriminatory housing practice” as the appropriate triggering event.⁶⁵ Although ostensibly aware of the discovery rule,⁶⁶ the court ultimately found the statute of limitations had not run based solely on a continuing violations theory—a conclusion perhaps influenced by the fact that the discovery rule would not save the plaintiffs’ case. In *Montana Fair Housing, Inc. v. American Capital Development, Inc.*,⁶⁷ a handicapped resident and applicant for low-income housing brought suit against the architect, builders, and owners for violations of

61. *Berry v. Branner*, 421 P.2d 996, 998 (Or. 1966) (presenting a rational approach to the limitations period on behalf of those who do not discover an injury until after the limitations period has ended) (citation omitted).

62. *See Garcia v. Brockway*, 526 F.3d 456, 464 (9th Cir. 2008) (stating that “The FHA’s limitations period does not start when a particular disabled person is injured by a housing practice, but by ‘the occurrence or the termination of an alleged discriminatory housing practice.’”); *see also Kubrick*, 444 U.S. at 125 (acknowledging that “statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims.”).

63. *See E. Paralyzed Veterans Ass’n v. Lazarus-Burman Assocs.*, 133 F. Supp. 2d 203 (E.D.N.Y. 2002); *Mont. Fair Hous. Inc. v. Am. Capital Dev., Inc.*, 81 F. Supp. 2d 1057 (D. Mont. 1999).

64. *E. Paralyzed Veterans*, 133 F. Supp. 2d at 212–13.

65. *Id.*

66. *Id.*

67. 81 F. Supp. 2d 1057 (D. Mont. 1999).

accessibility standards.⁶⁸ Similar to *Eastern Paralyzed Veterans*, the court in *Montana Fair Housing* acknowledged the discovery rule in stating that the earliest the limitations period could begin was when the plaintiffs took residence because that was when the violations “were apparent.”⁶⁹

2. Negative Treatment of the Discovery Rule

A third district court decision has espoused the view that based on the language of the FHA, the discovery rule does not apply to design and construction claims. In *Moeske v. Miller & Smith, Inc.*,⁷⁰ a disabled individual brought suit against developers, architectural firms, and a condominium association, alleging FHA design and construction violations.⁷¹ The court in *Moeske* considered and dismissed plaintiffs’ continuing violations arguments, and then focused on the language of the FHA’s statute of limitations to determine the applicability of the discovery rule.⁷² After finding that legislative use of the term “occurrence” refers to a temporally discrete episode of discrimination—for example, the sale of a non-compliant residence—the *Moeske* court held “[t]he FHA unambiguously states that the ‘occurrence’ of the discriminatory act will trigger the statute of limitations. Therefore, the discovery rule does not apply here.”⁷³

Two subsequent cases have considered the holdings of *Moeske*, *Eastern Paralyzed Veterans*, and *Montana Fair Housing*. In *United States v. Hallmark Homes, Inc.*,⁷⁴ a fair housing organization and the government brought suit against architects and builders, alleging that the common portions, doorways, and bathrooms of an apartment complex were not accessible to persons with disabilities.⁷⁵ Although *Hallmark Homes* was not a private suit, but rather one brought by the government and a fair housing organization,⁷⁶ the court looked to *Moeske*, *Eastern Paralyzed*

68. *Id.* at 1059–63 (describing the facts surrounding the litigation and providing a recapitulation of the procedural history leading up to this decision).

69. *Id.* at 1063. Interestingly, in *Montana Fair Housing*, the discovery rule was argued not by the plaintiffs, but by the defendants (architect and builder among them). *Id.* In effect, then, the court declined to follow the discovery rule, instead opting for the (more generous) continuing violations rule. *Id.* On the facts of the case, applying the discovery rule would have required dismissal because the claims still would have been untimely. *See id.* One explanation for this outcome may be the court’s inclination to achieve a “just result”—by providing the plaintiffs with the relief they sought.

70. 202 F. Supp. 2d 492 (E.D. Va. 2002).

71. *Id.* at 494–95.

72. *Id.* at 509.

73. *Id.* (citation omitted).

74. No. CV01-432-N-EJL, 2003 WL 23219807 (D. Idaho Sept. 29, 2003).

75. *Id.* at *1.

76. The case actually involved two separate claims. The first was filed by the Intermountain Fair Housing Council with HUD under the Fair Housing Act, § 812(a), 42 U.S.C.

Veterans, and *Montana Fair Housing* for guidance. The *Hallmark Homes* court found the reasoning in *Moeske* persuasive because it thought the linguistic statutory analysis the *Moeske* court undertook was highly informative of the rule's application.⁷⁷ In *Hallmark Homes*, the relevant statute of limitations mirrored the private-suit statute (an aggrieved person must file a complaint "not later than *one* year after an alleged discriminatory housing practice has occurred or terminated."⁷⁸ As such, the *Hallmark Homes* court followed *Moeske* in holding that "this language is not susceptible to an interpretation that permits incorporation of the discovery rule."⁷⁹

In a second case to follow the *Moeske* court, *United States v. Taigen & Sons, Inc.*,⁸⁰ the United States brought suit against a builder and an architect, alleging that their construction and design violated accessibility standards of both the FHA and the Americans with Disabilities Act (ADA).⁸¹ Following *Moeske*, the *Taigen* court held that even in a case for civil penalties, the limitations period begins to run on the date of the alleged violation, when the design or construction phase was finished.⁸²

Finally, the most recent design and construction case considering the discovery rule is *Garcia v. Brockway*.⁸³ The *Garcia* decision consisted of two cases consolidated on appeal: *Garcia v. Brockway* and *Thompson v. Gohres Construction Co.* In *Garcia*, a disabled resident of a multifamily dwelling filed suit against the original builder and architect, as well as the current owners and managers for violating the FHA's accessibility requirements.⁸⁴ Similarly, in *Thompson*, a disability rights group brought suit against the original builder and current owner of an apartment com-

§ 3612(a). Asserting their statutory right under § 812(o), the defendants removed that claim to federal court rather than continuing with the administrative process. The government then initiated a separate claim against the same defendants under § 814(a), and joined the two suits. The claims allege the same design and construction violations. *Hallmark Homes*, 2003 WL 23219807, at *1 (D. Idaho Sept. 29, 2003).

77. *Id.* at *2. The linguistic analysis in *Moeske* focused on the discrete nature of both words used in the relevant sections of the FHA—"termination" and "occurrence." *Moeske*, 202 F. Supp. 2d at 509.

78. Fair Housing Act § 810(a)(1)(A)(i), 42 U.S.C. § 3610(a)(1)(A)(i) (2006) (emphasis added).

79. *Hallmark Homes*, 2003 WL 23219807, at *2 (citing *Moeske*, 202 F. Supp. 2d at 509).

80. 303 F. Supp. 2d 1129, 1135 (D. Idaho 2003).

81. *Id.* at 1135.

82. *Id.* at 1143–44.

83. 503 F.3d 1092, 1094–95 (9th Cir. 2007), *aff'd en banc*, 526 F.3d 456 (9th Cir. 2008). See Part V of this Note for analysis on the *Garcia* decision. This brief discussion of *Garcia* focuses on the court's analysis of the discovery rule as applied to design and construction cases only.

84. *Id.* at 1094–95 (providing a background description of the facts surrounding the case and resulting in litigation).

plex asserting a FHA design and construction claim on behalf of the organization's "testers."⁸⁵ While the *Garcia* court focused on the continuing violations doctrine, it also addressed the plaintiff's discovery rule assertion.⁸⁶ Similar to *Moeske*, the *Garcia* court held that to employ the discovery rule would contradict the plain text of the FHA, and that "the statute of limitations for private civil actions begins to run when the discriminatory act occurs—not when it's encountered or discovered."⁸⁷ The plaintiffs in *Garcia* had argued that the limitations period could not commence "until a disabled person is *actually damaged* by the [discriminatory] practice."⁸⁸ In support of their argument, plaintiffs cited to the Supreme Court, arguing that "[a] damages action under the [FHA] sounds basically in tort" and thus, the limitations period does not begin until the plaintiff has a complete cause of action, including actual injury.⁸⁹ The *Garcia* court rejected this argument, and held that the limitations period under the statute begins to run not at the point when the violation was discovered, but when the violation *occurred*, which in this case was when the defendant failed to design and construct the dwelling in accordance with FHA regulations.⁹⁰ While the court acknowledged that the FHA "sounds basically in tort," it failed to give force to basic tort principles over the more specific and explicit language of the relevant statutory provisions.⁹¹

E. *Why the Discovery Rule Should Apply*

1. Difficulty of Detection

As stated previously, a central justification for the discovery rule is the notion of justice and fairness in judicial proceedings. For this reason, courts are generally more willing to extend the discovery rule to instances where an injury or facts or conditions giving rise to a cause of action are

85. *Id.* at 1095 (discussing the suit initiated by Disabled Rights Action Committee member, Tamara Thompson). "Testers," in this context, are individuals sent to check for violations of the FHA or other civil rights statutes. *See id.*

86. Only one plaintiff, Noll Garcia, asserted the discovery rule in response to defendants' motions to dismiss. *Id.* at 1099 n.7. Garcia also alternatively argued the continuing violation doctrine and equitable tolling doctrine. *Id.*

87. *Id.* at 1100 (citing the Fair Housing Act § 813(a)(1)(A), 42 U.S.C. § 3613(a)(1)(A)).

88. *Garcia v. Brockway*, 503 F.3d 1092, 1099 (9th Cir. 2007), *aff'd en banc*, 526 F.3d 456 (9th Cir. 2008) (emphasis added).

89. *Id.* (quoting *Curtis v. Loether*, 415 U.S. 189, 195 (1974)).

90. *Id.* at 1100 (interpreting FHA § 813(a)(1)(A)).

91. *Id.* at 1099 ("This passing reference to tort law cannot be read to trump statutory provisions that deal expressly with the statute of limitations.").

unusually difficult to detect.⁹² Design and construction cases under the FHA are frequently difficult for potential plaintiffs to detect. This is certainly true in comparison with architects and builders, who are—presumably—more familiar with the post-1991 FHA and HUD accessibility requirements.⁹³ The disparity-of-knowledge rationale⁹⁴ is further bolstered in design and construction claims by the text and history of the FHAA as “a broad mandate to eliminate discrimination against and equalize housing opportunities for disabled individuals.”⁹⁵ Congress has further stated that the disability amendments to the FHA are “a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream.”⁹⁶ If the purpose and intent of Congress in promulgating and amending the FHA is to be achieved, it would seem that some equitable limitations mechanism must be read into the statute, giving teeth to the accessibility guarantees therein.⁹⁷ Indeed adopting a strict limitations approach in design and construction cases—for example, starting the statute of limitations upon completion of construction or the sale of the first or last unit—lacks support from a purely textual standpoint and makes very little practical sense in light of the purposes of the FHA.⁹⁸

92. This is because the discovery rule imputes knowledge to a plaintiff where injury is such that it should reasonably be discovered at the time it occurs. That is, the more obvious an injury or cause of action, the less reasonable ignorance of it will be, and the less willing courts will be to apply the discovery rule. The contrary is also true.

93. With regard to the discovery rule, one commentator has written, “courts often have been more inclined to apply the discovery rule where there is a significant disparity in the ability of the plaintiff, as compared to the defendant, to become aware of critical information necessary to know that a wrong has occurred.” James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 VA. ENVTL. L.J. 589, 596–97 (1996).

94. The disparity of knowledge was observed and critiqued by Judge Fisher in *Garcia*:

As a result of [denying the discovery rule's application], disabled persons—the statute's actual intended beneficiaries—will be stripped of their ability to enforce the FHA's most important protection [privately-brought design and construction suits] and instead will be relegated to “reasonable modifications” at their own expense. In contrast, real estate developers and landlords who ignore the FHA's design requirements will receive a free pass once two years have elapsed since a defective building's construction.

Garcia v. Brockway, 503 F.3d 1092, 1101 (9th Cir. 2007) (Fisher, J., dissenting), *aff'd en banc*, 526 F.3d 456 (9th Cir. 2008).

95. *Bronk v. Ineichen*, 54 F.3d 425, 428 (7th Cir. 1995) (discussing the purpose and interpretation of the FHAA).

96. H.R. REP. NO. 100-711, at 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179.

97. See Part IV. F. of this Note for a discussion of Congress' incorporation of one equitable limitations mechanism—the continuing violations doctrine.

98. *Accord Fair Hous. Council, Inc. v. Village of Olde St. Andrews, Inc.*, 210 Fed. Appx. 469, 480 (6th Cir. 2006) (rejecting defendant's argument that the limitations period

2. Interpreting “Aggrieved”

A second reason for reading a discovery rule into the statute of limitations under FHA § 813 is that such an interpretation would be in substantial accord with the express language of the statute. While many courts that considered the applicability of the discovery rule to the FHA’s statutes of limitations started with the text of the statute, few have given weight to the word “aggrieved” contained therein. The private suit statute of limitations reads, in relevant part: “*An aggrieved person* may [bring suit] . . . not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement . . . whichever occurs last, . . .”⁹⁹ The Supreme Court has noted that an action brought for compensation by a victim of housing discrimination is, in effect, a tort action.¹⁰⁰ More recently, the Court reaffirmed that characterization and held that when interpreting the FHA, the Court will assume Congress intended its legislation to incorporate ordinary tort principles.¹⁰¹ If the notion that the FHA “sounds basically in tort”¹⁰² is accepted, then the word “aggrieved” must be read as requiring injury for the statute of limitations to run.¹⁰³ Adopting a strict limitations period would effectively read the word “aggrieved” right out of the statute.¹⁰⁴ While alluringly simple and predictable, strict limitations will prevent even scrupulous plaintiffs from enforcing their civil rights. Innocent

should start with the construction and design of the housing units), *cert. denied sub nom.*, *WKB Assocs. v. Fair Hous. Council, Inc.*, 552 U.S. 1130 (2008).

99. Fair Housing Act § 813(a)(1)(A), 42 U.S.C. § 3613(a)(1)(A) (2006) (emphasis added).

100. *Curtis v. Loether*, 415 U.S. 189, 195 (1974) (explaining that courts are permitted to award damages based upon the breach of a statutorily-created duty).

101. *Meyer v. Holley*, 537 U.S. 280, 285 (2003).

102. *Curtis*, 415 U.S. at 195 (instructing that damages for a FHA violation must be recovered in tort).

103. See *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Febar Corp.*, 522 U.S. 192, 201 (1997) (the general rule is that the limitations period does not begin to run until a plaintiff has “a complete and present cause of action”); 54 C.J.S. *Limitations of Actions* § 112 (2009) (“An injury or damages may be required to be present before an action accrues and the statute of limitations begins to run.”); RESTATEMENT (SECOND) OF TORTS § 899 cmt. c (1979) (stating that “[s]tatutes of limitations ordinarily provide that an action may be commenced only within a specified period after the cause of action arises”); see also *Wallace v. Kato*, 549 U.S. 384, 391 (2007) (holding that the statute of limitations in 42 U.S.C. § 1983 commences to run when the unlawful act or omission causes damages).

104. But see *Garcia v. Brockway*, 503 F.3d 1092, 1099 (9th Cir. 2007), *aff’d en banc*, 526 F.3d 456 (9th Cir. 2008). “[P]assing reference[s] to tort law cannot be read to trump statutory provisions that deal expressly with the statute of limitations. The FHA’s limitations period does not start when a particular disabled person is injured by a housing practice, but by ‘the occurrence or the termination of an alleged discriminatory housing practice.’” (citation omitted).

litigants who first suffer discrimination in the design and construction of a dwelling more than two years after the structure's completion will be precluded from seeking a remedy under the law. By foreclosing this potentially vast group of plaintiffs from judicial recourse, the text and intent of the FHA seems thrown by the wayside. A wiser alternative probably would be to give credence to the words of the law and implement the discovery rule in design and construction cases.

One court has acknowledged the term "aggrieved" and creatively given it meaning apart from the statute of limitations. In *Garcia*, the majority agreed that the term "aggrieved" as it appears in the statute does, indeed, refer to a plaintiff's injury, but held that the plaintiff's injury "only comes into play in determining whether she has *standing* to bring suit."¹⁰⁵

IV. THE CONTINUING VIOLATIONS DOCTRINE

A. *What is the Continuing Violations Doctrine?*

The continuing violations doctrine is a second mechanism courts have used to extend the time plaintiffs have to bring suit. Under the continuing violations doctrine, a systematic "policy" or "practice" of discrimination is actionable even if some or nearly all of the events occur outside the statute of limitations period.¹⁰⁶ Plaintiffs who are denied housing are able to bring claims that would otherwise be time-barred so long as the last discriminatory act in the ongoing practice falls within the limitations period.

The continuing violations doctrine initially developed in the context of labor law disputes,¹⁰⁷ and was expanded to employment discrimination suits under Title VII of the Civil Rights Act of 1964.¹⁰⁸ The continuing

105. *Id.* (emphasis added). In his dissenting opinion, Judge Fisher argued that similar language in other statutes of limitations has been interpreted as a limitations requirement, not a prerequisite for plaintiff standing. *Id.* at 1106 (Fisher, J., dissenting). In doing so, he noted that if the term "aggrieved" is used to determine standing rather than to calculate the appropriate limitations period, then the statute is one of repose rather than limitations. *Id.* at 1107–08.

106. See *Ctr. for Bio. Diversity v. Hamilton*, 453 F.3d 1331, 1335 (11th Cir. 2006) (drawing a distinction between continuing violations and "continuing effects of a discrete violation"); *Clark v. City of Braidwood*, 318 F.3d 764, 766–67 (7th Cir. 2003) (explaining that the continuing violation doctrine does not apply to a single event that causes continuing injuries). "[T]he continuing violation doctrine does not save an otherwise untimely suit when 'a single event gives rise to continuing injuries.'" *Clark v. City of Braidwood*, 318 F.3d 764, 766–67 (7th Cir. 2003).

107. See, e.g., *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1050 (5th Cir. 1973) (failure to pay female employees the same wage rate paid male employees constituted a continuing violation of the Equal Pay Act).

108. See, e.g., *Jenkins v. Home Ins. Co.*, 635 F.2d 310, 311–12 (4th Cir. 1980) (discriminatory wage discrepancy constituted a continuing violation for limitations period under

violations doctrine has since been held to apply to the FHA where plaintiffs allege that there is a pattern, practice, or policy of housing discrimination, as opposed to discrete, isolated instances of discrimination.¹⁰⁹ Of course, divergent views have emerged among courts as to whether an act is a continuing violation (pattern, practice, or policy) or a past (discrete and isolated) violation which has continued effects.¹¹⁰

B. *The Rationale for the Continuing Violations Doctrine*

The main justification for the continuing violations doctrine is that, where appropriately applied, the problems of stale and fraudulent claims that statutes of limitations are meant to protect against will not be present.¹¹¹ In many continuing violations cases, there is at least some fresh evidence, alleviating the staleness concern. Further, because the pattern or practice of discrimination is ongoing, the defendant should be on notice that he is susceptible to suit. A second justification for the continuing violations doctrine is the notion that some causes of action may be based on the long-term effects of a course of conduct rather than any single act viewed in isolation.¹¹² This rationale is particularly apt when observed in the context in which the continuing violations theory gained force: em-

Title VII of the Civil Rights Act); see also James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 VA. ENVTL. L.J. 589, 626-30 (1996) (tracing the background and development of the continuing violations doctrine). The National Labor Relations Board, shortly after the passage of the Labor Management Relations Act of 1947, started to apply the continuing violations theory in response to the six-month limitations period set forth in § 10(b) of the Act. James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 VA. ENVTL. L.J. 589, 626 (1996). However, in federal courts this theory experienced mixed results. *Id.* Furthermore, while the theory's existence was recognized by the United States Supreme Court, they "rejected its application where the conduct occurring within the limitations period was not a violation." *Id.* Some federal courts, following the ratification of the Civil Rights Act of 1964, applied the continuing violation doctrine specifically to the Equal Employment Opportunity Commission's ninety-day statutory time period for filing complaints. *Id.* at 627. The doctrine has been utilized in many differing contexts by federal courts, such as cases involving RICO, the Lanham Act, the Consumer Product Safety Act, and the Copyright Act. *Id.* at 629-30.

109. See, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 381 (1982).

110. See Part IV.C. of this Note.

111. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982). ("Where the challenged violation is a continuing one, the staleness concern disappears.").

112. See James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 VA. ENVTL. L.J. 589, 631-32 (1996) (explaining how statutory construction allows for a more flexible interpretation of the statute of limitations).

ployment discrimination.¹¹³ For example, hostile work environment claims are based solely on a pattern or practice of discrimination, and it would be nearly impossible to bring a cognizable hostile environment claim without extending the statute of limitations by some means.¹¹⁴ The continuing violations doctrine neatly remedies this problem. As a final justification, the plain language of many statutes lends itself to the incorporation of a continuing violations theory. The same statutory language to which proponents of the discovery rule cite¹¹⁵ can be seen as endorsing the continuing violations theory. Under this interpretation, limitations periods that begin when a claim “accrues” or “arises” do not begin to run until the injury is complete or, alternatively, when the violation ceases to exist.

C. *Havens Realty Corp. v. Coleman*

Almost thirty years ago, in *Havens Realty Corporation v. Coleman*,¹¹⁶ the Supreme Court held the continuing violations doctrine applicable to privately-brought FHA claims in certain circumstances.¹¹⁷ *Havens* involved a class action brought (outside the limitations period) against the owner of an apartment complex in a Richmond, Virginia suburb, and one of its employees.¹¹⁸ The plaintiffs alleged that the owner and employee were involved in “racial steering” in violation of the FHA.¹¹⁹ The plain-

113. See *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 105 (2002) (“We also hold that consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as an act contributing to that hostile environment takes place within the statutory time period.”). A cause of action initiated beyond the limitations period is not barred as long as one of the acts in the continuing chain of violations took place within the limitations period. *Id.*; see also *Turner v. Saloon Ltd.*, 595 F.3d 679, 684 (7th Cir. 2010) (“Thus, under *Morgan*, an employee claiming a hostile work environment ‘may file the charge (under Title VII) . . . within the statutory time from the last hostile act.’”(citation omitted)).

114. See, e.g., *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 105 (2002); *Turner v. Saloon Ltd.*, 595 F.3d 679, 684 (7th Cir. 2010).

115. See Part III of this Note.

116. 455 U.S. 363 (1982).

117. *Id.* at 380–81.

118. *Id.* at 368, 380–81.

119. *Id.* at 366–67 (1982). “Racial steering” is explained in the complaint by plaintiff as a:

“[P]ractice by which real estate brokers and agents preserve and encourage patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups.”

Id. at n.1.

tiffs in *Havens* cited multiple instances where Black individuals were falsely informed that the complex had no vacancies while White individuals were told the opposite.¹²⁰ The plaintiffs also asserted that the alleged racial steering constituted a pattern or practice that had “deprived [plaintiffs] of the benefits of interracial associations.”¹²¹ In response to these allegations, the Court applied the continuing violations doctrine to the racial steering charge, stating that to do otherwise would “ignore[] the continuing nature of the alleged violation, . . . [and] undermine[] the broad remedial intent of Congress embodied in the Act.”¹²² The Court further justified this characterization by saying: “[W]here a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days¹²³ of the last asserted occurrence of that practice.”¹²⁴ With respect to the plaintiffs’ second argument—that a continuing violations theory should apply to their claims of receiving false information from the defendants—the Court held that the doctrine did apply because those were not discrete incidents standing in isolation, but a continuous violation.¹²⁵ The overall holding in *Havens*, then, is that the continuing violations doctrine is an appropriate equitable device where the alleged discrimination takes the form of a “practice,” “policy,” or “pattern,” but not in the case of isolated incidents or discrete acts of discrimination.

D. *Continuing Violations vs. Continuing Effects*

In considering various continuing violations assertions, courts have recognized a key distinction between a continuing violation and the continuing effects of a past violation.¹²⁶ This difference is subtle: where a continuing violation is typically a string of acts or occurrences that comprise a pattern or practice of discrimination, a discrete instance of discrimination which has lasting and constant effects will generally not be

120. *Id.* at 368.

121. *Havens*, 455 U.S. at 381.

122. *Id.* at 380.

123. The statute of limitations for private citizen suits was expanded from 180 days to two years by the FHAA. See 42 Fair Housing Act § 813(a)(1)(A)(i), 42 U.S.C. § 3613(a)(1)(A) (2006).

124. *Havens*, 455 U.S. at 380–81 (citing to the holding of the court).

125. *Id.* at 381.

126. See, e.g., *Jersey Heights Neighborhood Assoc. v. Glendening*, 174 F.3d 180, 189 (4th Cir. 1999) (rejecting the use of the continuing violation doctrine); *Nat’l Adver. Co. v. City of Raleigh*, 947 F.2d 1158, 1166–67 (4th Cir. 1991) (examining the difference between a continuing violation and continually felt effect from a single discriminatory act); *Moeske v. Miller & Smith, Inc.*, 202 F. Supp. 2d 492, 506–07 (E.D. Va. 2002).

sufficient to invoke the doctrine.¹²⁷ The thrust of this distinction is that the violation itself is ongoing in a continuing violations claim; on the other hand, if the statutory violation has come and gone although the effects of that violation that are felt by the plaintiff, then the doctrine does not extend the limitations period.¹²⁸ It quickly becomes apparent that the characterization of a claim as either a continuing violation or merely the continued effects of a past violation will turn on how a particular statute defines “violation.”

E. *The Continuing Violations Doctrine and Design and Construction Claims*

1. Positive Treatment of the Continuing Violations Doctrine

i. *Silver State Fair Housing Council v. ERGS*

A handful of district courts and two circuit courts have had occasion to consider the continuing violation doctrine and its application to design and construction claims. In *Silver State Fair Housing Council, Inc. v. ERGS, Inc.*,¹²⁹ a fair housing organization brought suit against the developer of two apartment complexes.¹³⁰ The defendant moved for summary judgment, alleging that the statute of limitations had run because the plaintiffs brought suit nearly five years after the completion of construction.¹³¹ In finding for the plaintiffs, the *Silver State* court cited to *Havens* for the proposition that complaints are timely when filed within two years of the last occurrence of a continuing violation.¹³² The court explained that because the development of the apartment complexes was “seamless in time,” the defendant’s actions of designing and constructing both complexes in non-compliance were best viewed as a single continuing violation.¹³³ Thus, the *Silver State* decision was groundbreaking for at least one point of law: it was the first decision to hold that discrimination in the design and construction of multiple developments could constitute a single continuing violation.

127. See *Moeske*, 202 F. Supp. 2d at 505–07 (rejecting the continuing violations doctrine because the discriminatory act—the design and construction—occurred more than two years before suit was filed, despite the continuing effects of that act, namely the inaccessible features of the building).

128. See *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (“The emphasis is not upon the effects of earlier [acts]; rather, it ‘is [upon] whether any present *violation* exists.’” (citing *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977)) (emphasis in original)).

129. 362 F. Supp. 2d 1218 (D. Nev. 2005).

130. *Id.* at 1219–20.

131. *Id.* at 1220–21.

132. *Id.* at 1221 (citing the holding of the *Havens* Court, which considers suits filed within two years of the last discriminatory act a timely filing).

133. *Id.* at 1220–21.

The penultimate paragraph in the *Silver State* court's decision is remarkable for two reasons. First, the *Silver State* court agreed with the holding of a contrary decision, *Moeske*, in construing the outer limits of the continuing violations doctrine.¹³⁴ Although it declined to define the limits of the continuing violations doctrine, the *Silver State* court agreed that indefinite liability—such as that advanced by the HUD guidelines¹³⁵—could not be supported because such an interpretation would read the statute of limitations right out of the statute.¹³⁶ Second, and in explaining why the plaintiff's claims did not stretch the doctrine to its limit, the court referenced the discovery rule, whether intentionally or not.¹³⁷ Specifically, it held that the length of time in this case was not unreasonable because the plaintiff brought suit within five years of construction, within three years of when the statute would have run for discrete-act claims, and just “one year after discovering the alleged violations.”¹³⁸ While perhaps appealing to the notion of equity,¹³⁹ it is difficult to see why the discovery should impact the application or scope of the continuing violations doctrine. Remember that, in the design and construction context, the continuing violations doctrine focuses on the ongoing discriminatory acts of a developer; whereas the discovery rule aims to achieve equity by focusing on the aggrieved individual's plight rather than the developer's actions. Thus, the court's inclusion of the discovery rule in its analysis seems misplaced at best.

ii. Other cases

In *Eastern Paralyzed Veterans Association, Inc. v. Lazarus-Burman Associates*,¹⁴⁰ a disabled plaintiff brought suit alleging that the defendant's apartment complex was in violation of the FHA.¹⁴¹ Specifically, the com-

134. See *Silver State*, 362 F. Supp. at 1222.

135. See generally OFFICE OF FAIR HOUS. AND EQUAL OPPORTUNITY, U.S. DEP'T OF HOUS. AND URBAN DEV., FAIR HOUS. ACT DESIGN MANUAL (1998), available at <http://www.huduser.org/publications/pdf/fairhousing/fairfull.pdf>. The guidelines seek to produce “a clear statement of HUD's interpretation of the accessibility requirements of the Act” so individuals will understand what is required of them under the Act. *Id.* at Preface. Secondly, the guidelines offer guidance and recommendations regarding alternative accessibility approaches. *Id.*

136. *Silver State*, 362 F. Supp. 2d at 1222 (agreeing with the reasoning of the *Moeske* court).

137. See *id.*

138. *Id.*

139. This view is supported by the following sentence, which references the “broad remedial intent of Congress.” *Id.* (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982)).

140. 133 F. Supp. 2d 203 (2001).

141. *Id.* at 205–06.

plaint alleged that the complex did not have ramps, adequately wide enough hallways or doorways, or accessible outlets, switches, and environmental controls in violation of the design and construction sections of the FHA.¹⁴² Because the court found that the complex was in non-compliance for a seven-year period, and, as such, unavailable to wheelchair users, it held that the defendant had engaged in a continuing violation.¹⁴³ The crux of the continuing violation was mere passive non-compliance with FHA and HUD guidelines—it was literally the building standing as it was built. The *Eastern Paralyzed Veterans* court thus adopted the expansive interpretation that *Silver State* and *Moeske* declined to implement.

In *Montana Fair Housing, Inc. v. American Capital Development, Inc.*, a handicapped resident brought suit against the architect, builder, and owner of a low-income housing project.¹⁴⁴ The *Montana Fair Housing* court cited to the *Havens* decision, explaining that “the continuing violations doctrine requires that at least one incident of discrimination must fall within the statute of limitations period.”¹⁴⁵ While the plaintiffs claimed that the defendant’s FHA violations were continuous, they admitted that a “cure” took place when a wheelchair ramp was installed outside of their unit.¹⁴⁶ In response to the defendants’ motion for summary judgment, the court held that the limitations period did not begin to run, at the earliest, until the accessibility barriers were cured—in this case, when the ramp was installed allowing complete wheelchair access.¹⁴⁷ Like *Eastern Paralyzed Veterans* then, the court in *Montana Fair Housing* adopted the most expansive interpretation of the continuing violations doctrine: that the limitations period does not commence until the building is brought into full compliance with the FHA and HUD regulations.

In *National Housing Alliance v. A.G. Spanos Construction*,¹⁴⁸ fair housing organizations filed suit against owners and builders, alleging that multiple apartment complexes were constructed in a manner that denied access to the disabled.¹⁴⁹ Plaintiffs essentially asserted the holding in

142. *Id.* at 212–13 (delineating specific violations alleged by plaintiffs to be violations of the FHA).

143. *Id.* (explaining that since the unlawful practice engaged in by defendants was continuous in nature, defendants were not entitled to a motion to dismiss due to untimely filing).

144. 81 F. Supp. 2d 1057, 1060–62 (D. Mont. 1999).

145. *Id.* at 1063.

146. *Id.*

147. *Id.*

148. 542 F. Supp. 2d 1054 (N.D. Cal. 2008)

149. *Id.* at 1057–58 (describing the facts surrounding the litigation).

Eastern Paralyzed Veterans and *Montana Fair Housing*: that the defendants were engaged in a continuing violation since construction of some of the complexes was still ongoing.¹⁵⁰ In response, the defendants argued that because each instance of construction was a discrete violation of the FHA, the continuing violations doctrine was wholly inapplicable, and only those claims brought within two years of respective construction date were timely.¹⁵¹ The *Spanos* court found defendants' arguments unpersuasive.¹⁵² It stated that just as a single instance of racial steering is a single actionable breach of the FHA, so too is the construction of each apartment complex.¹⁵³ The court went on to explain that, because the defendants had been designing and constructing apartment buildings repeatedly for nearly two decades, they had engaged in a pattern or practice of discrimination sufficient to trigger the continuing violations doctrine.¹⁵⁴ It is important to distinguish the rationale behind *Spanos* from *Eastern Paralyzed Veterans* and *Montana Fair Housing*. Where the latter two cases held the design and construction of a *single* complex to be an ongoing violation until non-compliance is remedied, *Spanos* declared that serial construction of multiple complexes gives rise to a continuing violation. The *Spanos* decision is thus in accord with the "strict limitations" argument that the statute of limitations begins to run on the completion of construction. It is possible, then, if the *Spanos* court had been presented with discrete claims against each apartment complex individually, it might have found no continuing violation and no legitimate design and construction claim for those built more than two years prior or complaint.

Finally, in *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, a handicapped individual and a nonprofit housing corporation brought suit against a condominium association and the builders of the complex for non-compliant design and construction.¹⁵⁵ The defendants moved for summary judgment, arguing that because two years had passed since both the completion of construction and the issuance of the last use and occupancy permits, the suit was time-barred.¹⁵⁶ The *Rommel* court held that

150. *Id.* at 1061 (outlining the basic allegations of the plaintiffs).

151. *Id.* at 1060–61.

152. *Id.* at 1061.

153. *Id.* at 1061–62.

154. 542 F. Supp. 2d at 1062.

155. 40 F. Supp. 2d 700, 703 (D. Md. 1999) (recapitulating the contentions of the parties and the procedural history surrounding the litigation).

156. *Id.* at 709 (discussing defendants' argument for judgment as a matter of law due to the untimeliness of plaintiffs' claims). Defendants claimed plaintiffs were on constructive notice of any alleged violation the moment the use and occupancy permits were issued for the buildings. *Id.* Defendants also asserted that the issuance of these permits was the proper starting point for the limitations period "because it determines whether the build-

the continuing violations doctrine applied, and extended the triggering event for the limitations period to the last occurrence of the violation, which the court found to be the sale of the last inaccessible unit.¹⁵⁷ This holding is different from the three above cases because it reads the FHA's design and construction requirements as inextricably tied to the sale or rental of new housing, and it was later adopted by one of only two courts of appeals to weigh in on the issue.¹⁵⁸

2. Fair Housing Council v. Village of Olde St. Andrews

i. Factual and Procedural Background

One of the most recent cases affirming application of the continuing violations doctrine to design and construction cases under the FHA is *Fair Housing Council, Inc. v. Village of Olde St. Andrews*.¹⁵⁹ In *Village of Olde St. Andrews*, a nonprofit housing corporation brought suit in district court against an architect, a building company, and a homeowners' association, claiming that several residential properties were not accessible to handicapped persons under the FHA as amended by the FHAA.¹⁶⁰ In response, the defendants filed a motion for summary judgment challenging the organization's standing and asserting that the claims were not timely.¹⁶¹ The plaintiffs replied that "the continuing existence of FHAA non-compliant buildings constitutes a continuing violation under the FHAA."¹⁶² They asserted the broadest interpretation of the continuing violations doctrine, just as the *Eastern Paralyzed* and *Montana Fair Housing* plaintiffs had. The court denied defendants' motion for summary judgment, finding that the plaintiffs had organizational standing to sue and that the claims were not time-barred because the statute of limita-

ings are subject to the FHAA, it is the first time the buildings are available to the public, and it is the time when all events are necessary to state a claim occurred." *Id.*

157. *Id.* at 709–10 (explaining how the application of continuing violations doctrine allowed plaintiffs to successfully assert their claims).

158. See Part IV.E.2 of this Note.

159. See generally 250 F. Supp. 2d 706 (W.D. Ky. 2003).

160. *Id.* at 709–11 (discussing in detail the FHAA violations plaintiffs alleged existed at the Village). Violations discovered by FHC agents included impermissibly narrow doorways, building entrances which required an individual to scale six to eight inch steps, lack of solid reinforcement in bathrooms which is required for grab bar installation and inaccessible sinks, electrical outlets, and environmental controls. *Id.* at 710–11.

161. *Id.* at 708 (delineating defendants' claim that plaintiffs' cause of action is partially barred due to the untimeliness of the filing). Defendants attacked the plaintiffs' standing in addition to claiming entitlement to a judgment as a matter of law, alleging that their developments are not required to comply with FHAA. *Id.*

162. *Id.* at 718.

tions did not run until the last unit was initially sold.¹⁶³ In reaching that conclusion, the court stated that the discriminatory act at issue was the design and construction of the dwellings for sale or rental under § 804(f)(3)(C).¹⁶⁴ Reiterating the distinction between continuing violations and the continued effects of a past violation,¹⁶⁵ the court ultimately held that “the last asserted occurrence of the [discriminatory] practice . . . occurred when the last unit was sold[,] which occurred within two years of this suit.”¹⁶⁶ Maintaining that the plaintiffs’ claims were time-barred, the defendants appealed to the Sixth Circuit.¹⁶⁷

ii. Sixth Circuit Opinion

On appeal, the parties maintained their arguments with regard to the limitations period. The defendants contended that the appropriate triggering event was “completion of the design and construction” phase on the dwellings.¹⁶⁸ Alternatively, the plaintiffs maintained that the continuing violations doctrine applied with sweeping force: they argued that the limitations period does not begin to run until the accessibility barriers were completely remedied.¹⁶⁹ The Sixth Circuit declined to follow either party’s argument, and instead affirmed the district court’s ruling that the statute of limitations does not begin to run until the last non-compliant unit is sold.¹⁷⁰ In its analysis, the court stated that neither party’s viewpoint was grounded in the text of the relevant FHA provision.¹⁷¹ On the one hand, the court held that the limitations period must extend beyond the completion of construction because the FHA focuses on housing discrimination in the context of sale or rental.¹⁷² On the other hand, the

163. *Id.* at 718–19 (holding the complaint was filed within the two year statutory period based upon a limitations period that began with the last unlawful practice). “The continuing violation doctrine does in fact apply so long as there is some ongoing act being performed as it pertains to the design and construction of the development. The mere existence of a non-compliant building, however, is not an act.” *Id.* at 719.

164. *Vill. of Olde St. Andrews*, 250 F. Supp. 2d at 718.

165. See Part IV.D. of this Note.

166. *Vill. of Olde St. Andrews*, 250 F. Supp. 2d at 719.

167. *Fair Hous. Council, Inc. v. Vill. of Olde St. Andrews, Inc.*, 210 Fed. App’x 469 (6th Cir. 2006), *cert. denied sub nom.*, *WKB Assocs., Inc. v. Fair Hous. Council, Inc.*, 552 U.S. 1130 (2008).

168. *Id.* at 480 (6th Cir. 2006) (illustrating defendant’s continued position on appeal that the claims are barred by the limitations period).

169. *Id.* at 479 (discussing the major tenet of Plaintiff’s argument).

170. *Id.* at 481.

171. *Id.* at 479–80.

172. *Fair Hous Council, Inc. v. Vill. of Olde St. Andrews, Inc.*, 210 Fed. App’x 469, 479–80 (6th Cir. 2006), *cert. denied sub nom.*, *WKB Assocs., Inc. v. Fair Hous. Council, Inc.*, 552 U.S. 1130 (2008). The court referred to the interpretation that the design and construction provision—FHA § 804(f)(3)—is a definitional counterpart to the substantive

court held the limitations period cannot extend until the design and construction defects are completely cured, as the plaintiffs urged.¹⁷³

In concluding its opinion, the court in *Village of Olde St. Andrews* noted that the limitations period should be evaluated based on case-specific facts and circumstances.¹⁷⁴ First, the court said that in cases where a plaintiff alleges a pattern, practice, or policy of designing and constructing in violation of the FHA, the statute of limitations begins to run only after the sale of the last property—the sale being the most recent incident of discriminatory behavior.¹⁷⁵ Second, the court said that in cases alleging a single discriminatory violation rather than a continuing violation, the discovery rule applies.¹⁷⁶ Thus, the Sixth Circuit held that the statute of limitations will never begin to run on the completion of construction, but rather, at the sale of the last unit or upon the plaintiff's discovery of the non-conforming conditions, depending on the facts.

3. Negative Treatment of the Continuing Violations Doctrine

A number of courts have declined to apply the continuing violations doctrine to FHA design and construction cases. The leading argument against the doctrine's application is the distinction between a continuing violation and the continued effects of a past violation.¹⁷⁷

In *Moeske v. Miller & Smith, Inc.*, the first case to make such a distinction in a design and construction suit, a disabled plaintiff and an organizational plaintiff sued architectural firms and four condominium associations, alleging that the design and construction of the exterior and

provisions immediately preceding it—§ 804(f)(1)-(2). See Fair Housing Act § 804(f), 42 U.S.C. § 3904(f)(2006). The first two provisions make it illegal to “discriminate” in the sale or rental, or in the terms of sale or rental of a dwelling. *Id.* § 804(f)(1)-(2). The third provision defines discrimination as including designing and constructing covered housing in non-compliance with other portions of the statute. *Id.* § 804(f)(3). Thus, while the violative act may be the design and construction in non-compliance with the FHA, the court read the plaintiffs' rights as inextricably connected with the sale or rental of the non-compliant dwelling. *Vill. of Olde St. Andrews, Inc.*, 210 Fed. App'x 469, 479–80 (6th Cir. 2006). As such, the limitations period had to extend *at least* to the sale or rental of the disputed units.

173. *Fair Hous. Council, Inc. v. Vill. of Olde St. Andrews, Inc.*, 210 Fed. App'x 469, 489 (6th Cir. 2006), *cert. denied sub nom.*, *WKB Assocs., Inc. v. Fair Hous. Council, Inc.*, 552 U.S. 1130 (2008).

174. *Id.* at 481.

175. *Id.* (“[I]n cases where the plaintiff alleges that the owner of a multi-family housing development failed to design and construct the development so as to make it accessible to disabled individuals, the limitations period will depend on the specific circumstances of each case.”).

176. *Id.* (“[T]he limitations period . . . would begin to run from the date that individual attempted to buy the unit and discovered the nonconforming conditions.”).

177. See Part IV.D. of this Note.

common areas did not comport with the requirements of the FHA.¹⁷⁸ In their motion to dismiss, the defendants argued that the statute had run because the continuing effects of a design and construction process did not constitute a continuing violation.¹⁷⁹ The *Moeske* court sided with the defendants, stating “application of the continuing violation doctrine requires that defendants[] repeat acts regardless of whether the alleged discrimination is based on race, gender or disability.”¹⁸⁰ In finding that the defendants had engaged in a single discriminatory act—designing and constructing in non-compliance with the FHA—the court held that the continuing violations doctrine did not apply.¹⁸¹ For the *Moeske* court, the proper focus was on the defendants’ actions, not the continued existence of inaccessible features to which those acts lead.¹⁸² To hold otherwise, the court noted, would eliminate the statute of limitations from design and construction provisions altogether.¹⁸³

F. *Why the Continuing Violations Doctrine Should Apply*

1. Legislative History

Perhaps the most forceful argument to incorporate the continuing violations doctrine into the interpretation of the FHA’s statute of limitations is the legislative history of the FHAA. The FHAA amended the FHA by adding the words “or termination” to the private-suit statute of limitations.¹⁸⁴ In commenting on the impact of that addition, the House of Representatives declared that the addition “is intended to reaffirm the concept of continuing violations, under which the statute of limitations is measured from the date of the last asserted occurrence of the unlawful practice.”¹⁸⁵ Read in conjunction with the courts’ interpretation that the FHA represents a “broad mandate to eliminate discrimination against

178. 202 F. Supp. 2d 492, 494–96 (E.D. Va. 2002) (describing the factual basis for the claims filed against defendants).

179. *Id.* at 500–01.

180. *Id.* at 504.

181. *Id.* at 507. The *Moeske* court noted that there are two types of continuing violations: serial and systemic. *Id.* at 504. Serial continuing violations are manifested in a succession of related acts, where as systemic continuing violations take the form of a discriminatory policy or system. *Id.* The court declined to apply either type of continuing violations. *Id.* at 507–09.

182. *Id.* at 506.

183. *Moeske v. Miller & Smith, Inc.*, 202 F. Supp. 2d 492, 508 (E.D. Va. 2002).

184. Thus, suits must be filed “not later than two years after the occurrence *or termination* of an alleged discriminatory housing practice . . . whichever occurs last.” Fair Housing Act § 813(a)(1)(A)(i), 42 U.S.C. § 3613(a)(1)(A)(i) (2006) (emphasis added).

185. H.R. REP. NO. 100-711, at 33 (1988), *reprinted in* 1988 U.S.C.A.N. 2173, 2194.

and equalize housing opportunities for disabled individuals,”¹⁸⁶ this legislative pronouncement would seem to compel application of the continuing violations doctrine—where appropriate—in some form.

2. HUD Guidelines

Not surprisingly, the guidelines issued by HUD endorse the broadest application of the continuing violations doctrine in interpreting the FHA’s statute of limitations. The guidelines state: “With respect to the design and construction requirements, complaints could be filed at any time that the building continues to be in noncompliance, because the discriminatory housing practice—failure to design and construct the building in compliance—does not terminate.”¹⁸⁷ Under this view, the architect and builder are susceptible to suit *each time a disabled individual suffers harm and until they bring the structure into compliance* with the FHA and HUD guidelines. While HUD’s word is not binding on Article III courts, the views of the agency charged with enforcing the FHA carry fairly substantial weight.¹⁸⁸

3. Statutory Language

A final argument for the imposition of the continuing violations doctrine lies in the text of the disability discrimination provisions.¹⁸⁹ Under § 804(f)(1), it is unlawful “to discriminate in the sale or rental, *or to otherwise make unavailable . . . a dwelling to any buyer or renter because of a handicap of . . . that buyer or renter.*”¹⁹⁰ Since a design or construct that fails to comply with the FHA and HUD guidelines has the effect of making housing unavailable to disabled individuals, the structure is perpetually in violation of the above FHA section. Conversely, the limitations period should not begin to run on design and construction claims until units in challenged developments become available to individuals with disabilities—that is, until they conform to the requirements of the FHA.

186. *Bronk v. Ineichen*, 54 F.3d 425, 428 (7th Cir. 1995) (citing the purpose of the FHAA is to provide discrimination-free housing opportunities for all disabled individuals).

187. OFFICE OF FAIR HOUS. AND EQUAL OPPORTUNITY, U.S. DEP’T OF HOUS. AND URBAN DEV., FAIR HOUSING ACT DESIGN MANUAL 22 (1998), *available at* <http://www.huduser.org/publications/pdf/fairhousing/fairfull.pdf> (illustrating the seemingly endless timeframe in which an individual may file a complaint with the Secretary of HUD). An aggrieved person has one year from the date of the alleged discriminatory housing practice to file a complaint. *Id.*

188. *See Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 107 (1979) (“[HUD’s] interpretation of the [FHA] ordinarily commands considerable deference.”).

189. FHA § 804(f)(1)-(3).

190. *Id.* § 804(f)(1)-(f)(1)(A) (emphasis added).

Only when remediation is fully complete can it be said that the discriminatory housing practice has terminated and the statute begins to run.¹⁹¹

V. STRICT LIMITATIONS

A. *Moeske v. Miller & Smith, Inc.*¹⁹²

Recall that the court in *Moeske* held completion of the construction phase triggered the two-year statute of limitations for an FHA design and construction claim against an architect or builder, and that neither the continuing violations doctrine nor the discovery rule extended to postpone the running of that statute.¹⁹³ The court focused its analysis on the architects' acts rather than the continuing inaccessible features those acts caused.¹⁹⁴ In so holding, the *Moeske* court explained that "it strains statutory construction of the FHA to unreasonable limits to read 'continuing' into the very existence of a completed FHA non-compliant building. . . . Judicial expansion of liability into infinite limits is not supported by the case law nor the canons of statutory construction."¹⁹⁵ Thus, the court failed to expand the continuing violations doctrine to the mere passive existence of a noncompliant structure, finding that fact insufficient to constitute an ongoing violation of the law.

B. *Garcia v. Brockway*

1. Factual and Procedural Background

Garcia v. Brockway is a consolidation of two cases in which the plaintiffs alleged violations of the design and construction provisions of the FHA. In the first case, *Garcia v. Brockway*, the plaintiff was a tenant at an apartment complex in Idaho.¹⁹⁶ Garcia's apartment did not comply with the FHA's requirements, and his requests for improvements or relocation were ignored by the management.¹⁹⁷ Within two years of leasing the apartment, Garcia sued the owners as well as the original builder and

191. This argument finds further support in the discussion of accessibility in the FHAA's legislative history. See H.R. REP. NO. 100-711, at 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179 (providing that units must be accessible to disabled persons; otherwise, disabled persons "are in effect excluded because of their handicap").

192. The complete facts of this case are presented above. See Part IV.E.3. of this Note.

193. *Moeske v. Miller & Smith, Inc.*, 202 F. Supp. 2d 492, 510 (E.D. Va. 2002).

194. *Id.* at 506.

195. *Id.* at 508.

196. *Garcia*, 503 F.3d at 1094.

197. *Id.* at 1094-95 (reexamining the cause for the ensuing suit alleging violation of the FHA).

architect.¹⁹⁸ The district court granted summary judgment for the defendants, holding that Garcia failed to file within the limitations period, and Garcia appealed.¹⁹⁹ In the second case, *Thompson v. Gohres Construction Co.*, the plaintiffs were a civil rights organization and one of the organization's testers.²⁰⁰ One year after a tester inspected the premises, the plaintiffs brought suit against the original builders and a construction officer of an apartment complex in Las Vegas, alleging design and construction defects.²⁰¹ Again, the district court granted the defendants' motion to dismiss, holding that the claim was time-barred because suit was brought more than two years after construction was completed.²⁰² The plaintiffs in both cases appealed to the Ninth Circuit, where a panel decision affirmed the decisions below.²⁰³ On rehearing *en banc*, the court affirmed.²⁰⁴

2. Majority Opinion

By an eight to three margin, the court in *Garcia* held that the alleged discriminatory practice was the failure to design and construct according to the FHA standards.²⁰⁵ As such, it found that the termination of the design and construction phase triggered the statute of limitations, and specified that this occurs at the complex's issuance of the last certificate of occupancy.²⁰⁶ In reaching this conclusion, the court dealt with plaintiffs' arguments that equitable devices postponed the running of the statute of limitations.

First, as to the plaintiffs' continuing violations argument, the court endorsed the holding from *Moeske*, and held that the plaintiffs were "confus[ing] a continuing violation with the continuing effects of a past violation."²⁰⁷ The court also reiterated the apprehension that the *Moeske*

198. *Id.* at 1095.

199. *Id.* at 1094–95 (citing the decision entered by the lower court).

200. *Id.* at 1095.

201. *Garcia*, 503 F.3d at 1095.

202. *Id.*

203. *Id.* at 1101.

204. *Garcia v. Brockway*, 526 F.3d 456, 466 (9th Cir. 2008) (*en banc*).

205. *Garcia v. Brockway*, 503 F.3d 1092, 1096 (9th Cir. 2007) (citing Fair Housing Act § 804(f)(3)(c), 42 U.S.C. § 3604(f)(3)(c), *aff'd en banc*, 526 F.3d 456 (9th Cir. 2008)).

206. *Id.* (citing FHA § 804(f)(3)(c)).

207. *Id.* at 1097 (distinguishing between negative effects felt due to a past violation and effects that continue to be felt because the violation continues to cause harm).

The Supreme Court has "stressed the need to identify with care the specific [discriminatory] practice that is at issue." Here, the practice is "a failure to design and construct," which is not an indefinitely continuing practice, but a discrete instance of discrimination that terminates at the conclusion of the design-and-construction phase. This violation differs from one Congress codified as "continuing" in light of *Havens*,

court expressed, stating that if the court was to hold that the continuing violations doctrine applied to the case at bar, then developers and architects would have no finality, but would be subject to design and construction litigation indefinitely.²⁰⁸ Apparently, this outcome was too absurd for the court to stomach.

Second, the court turned to the plaintiffs' encounter rule and discovery rule arguments. Dispensing with the arguments rather swiftly, the court stated that the discovery and encounter rules were contrary to the plain "occurrence or termination" language of the FHA.²⁰⁹ The Ninth Circuit also noted that, with the recent expansion of FHA standing,²¹⁰ to implement either the discovery or encounter rule would open the door to a universe of potential plaintiffs.²¹¹ Finding these three doctrines inapplicable to the plaintiffs' cases, the Ninth Circuit held that the statute of limitations in design and construction cases begins to run promptly upon the completion of construction.²¹²

3. Dissents

Two cutting dissents, filed by three judges, followed the *Garcia* court's majority opinion. Judges Pregerson and Reinhardt adopted Judge Fisher's dissent, and wrote separately to stress how the majority opinion "perverts the purpose and intent of the statute."²¹³ This dissent took a pragmatic approach and applied the majority opinion to different scenarios. The authors stated that many disabled persons do not visit, buy, or lease non-compliant structures until years after a structure is built.²¹⁴ Thus, limiting FHA enforcement mechanisms to a maximum of two years and offering protection to only those individuals who encounter the non-compliant structure in that time frame severely limits the scope of the Act. In concluding, the Pregerson and Reinhardt dissent condemned the majority for construing the FHA in a manner that fails to accomplish its

where the claims were "based not solely on isolated incidents . . . , but a continuing violation manifested in *a number of incidents*—including at least one . . . that [wa]s asserted to have occurred within the [limitations] period."

Id. (emphasis added) (citations omitted) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 381 (1982)).

208. *Id.* at 1098.

209. *Id.* at 1099–00.

210. *Garcia*, 503 F.3d at 1096 (citing *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1104 (9th Cir. 2004) (holding that "testers" have standing to sue under the FHA)).

211. *Id.* at 1100.

212. *Id.* at 1101.

213. *Garcia v. Brockway*, 526 F.3d 456, 466 (9th Cir. 2008) (Pregerson & Reinhardt, J.J., dissenting) (en banc).

214. *Id.* at 467.

purpose: to eliminate barriers against persons with disabilities and integrate them into the mainstream of American society.²¹⁵

As noted, Judge Fisher also wrote a dissent. Rather than attacking the effects of the majority opinion, Judge Fisher took issue with the majority's decision in light of the statute's legislative history, plain language, and administrative agency guidance. First, Judge Fisher pointed to the pronouncement in the House Report accompanying the FHAA that the addition of the words "or termination . . . of an alleged discriminatory housing practice" was intended to incorporate the continuing violations doctrine.²¹⁶ Next, Judge Fisher argued that the plain text of the FHA disability provisions compels that it "is triggered when someone is aggrieved by one of the unlawful actions specified" therein.²¹⁷ In design and construction cases, allowing the statute of limitations to run on the completion of construction triggers the limitations period before anyone is actually "aggrieved."²¹⁸ Third, this dissent cited the HUD manual, which endorses the broadest incorporation of the continuing violations doctrine advanced.²¹⁹ While noting that Article III courts are not compelled to follow the opinion of HUD, Judge Fisher pointed out cases that uphold HUD's interpretation of the FHA are entitled to significant deference.²²⁰ Finally, Judge Fisher echoed the other dissenters in stating that the majority's decision works against the policy goals the FHA was promulgated to accomplish.²²¹

4. Analysis of *Garcia*, the Supreme Court's (non)Response, and Suggestions

The *Garcia* opinions differed in two primary respects. First, the majority and dissents disagreed on the appropriate interpretation of the statute's text. The majority interpreted § 804(f)(3) as defining the statutory violation—"failure to design and construct."²²² On the other hand, the dissenters argued that § 804(f) is merely a definitional provision, and the statutory violation continues as long as the dwelling is "unavailable . . . to

215. *Id.*

216. *Id.* at 468 (Fisher, J., dissenting).

217. *Id.* at 469.

218. *Garcia*, 526 F.3d at 468–69 (en banc) (Fisher, J., dissenting).

219. *Id.* at 475–76.

220. *Id.* at 476 (Fisher, J., dissenting) (citing *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 107 (1979); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1972)).

221. *Garcia v. Brockway*, 526 F.3d 456, 478 (9th Cir. 2008) (Fisher, J., dissenting) (en banc).

222. *Id.* at 460–61 (majority opinion).

[any buyer or renter] because of a handicap.”²²³ In their view, the dwelling is unavailable until the design defect is remedied.²²⁴ On this point, the FHA’s disability provision is indeed ambiguous. The language of the statute seems to support the dissenting viewpoint; § 804(f)(3) begins “[f]or purposes of this subsection, discrimination *includes* . . . a failure to design and construct.”²²⁵ On the other hand, the organization of § 804(f) indicates the opposite. § 804(f)(3) is a provision parallel to (f)(1) and (f)(2), which detail the actions constituting discrimination on the basis of disability. As such, it would seem logical to interpret § 804(f)(3) as creating substantive rights as well, the violation of which constitutes discrimination in and of itself. If that is the case, then understanding design and construction violations as discrete instances of discriminatory conduct appears to be correct. Because both interpretations of the statute are entirely plausible, and federal courts have thus far been unable to reach agreement, a legislative clarification is probably necessary and certainly desirable.²²⁶

Second, the opinions differed as to who the court should look to in determining the appropriate limitations-period trigger. The majority suggested that the proper focus is on the architect or builder, since the violation occurred in the design and construction phase.²²⁷ Conversely, the dissenting opinions suggested that it is inappropriate to allow the limitations period to run before “someone is aggrieved by one of the unlawful actions specified by [§ 804(f)(3) or § 804(f)(2)] which include design and construction defects as detailed in § 804(f)(3)(C).”²²⁸ On this point, the crucial disagreement is whether the FHA’s private-citizen suit statute is one of limitations or one of repose.²²⁹ Stated otherwise, is the goal of the statute of limitations to limit liability for architects and builders or to prevent stale claims from reaching the courts? Again, there is no judicial

223. *Id.* at 469–71 (Fisher, J., dissenting) (Fair Housing Act § 804(f)(1), 42 U.S.C. § 3604(f)(1) (2006)).

224. *Id.* at 466 (Pregerson & Reinhardt, J.J., dissenting) (en banc).

225. Fair Housing Act § 804(f)(3), (f)(3)(C).

226. Alternatively, in the interim, deference to HUD’s interpretation of the statute is most desirable.

227. *See Garcia*, 526 F.3d at 463.

228. *Id.* at 468–70 (Fisher, J., dissenting).

229. Compare BLACK’S LAW DICTIONARY 1450–51 (8th ed. 2004) (stating the purpose of a statute of limitations “is to require diligent prosecution of known claims”), with BLACK’S LAW DICTIONARY 1451 (8th ed. 2004) (“[T]he period contained in a statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted.” (citing 54 C.J.S. *Limitations of Actions* § 4 (1987))). The statute of limitations date is determined based upon the occurrence of an injury or when the injury was discovered; whereas with a statute of repose, the timetable commences based on the actions of a defendant and regardless of the plaintiff’s discovery of an injury. *Id.*

consensus on this point, and courts have given little attention to the subject.

One solution to these problems may be to differentiate between the architect and builder of a non-compliant dwelling and the owners and operators of the dwelling. This approach would effectively strike a bargain between the majority and dissenting opinions in *Garcia*, applying the majority analysis to architects and builders, but finding a continuing violation by those in control of the structure. As one court noted:

[T]his interpretation would establish an ongoing duty on the part of the entities in control of a building to make corrections to bring it into compliance with the FHA while limiting the liability of entities whose involvement and control over the accessibility of a building ends once the building is complete.²³⁰

Not only does this approach accomplish the goals the FHA was enacted to carry out, it operates in an incredibly logical and simple way. While the initial violators may have ceased all involvement with the offending structure, thus warranting the statute of limitations' running, the "remaining [d]efendants continue to benefit from that oversight by renting inaccessible units."²³¹ As such, the continuing violations doctrine should capture that continuing practice but omit the past offenders—the architects and builders.²³²

In any case, the proper resolution of these issues will have to wait. Most recently, the Supreme Court denied rehearing the *Garcia* decision.²³³ The Court probably denied certiorari because it would be relatively premature to hear the case. After all, though a number of district courts have weighed in on the issue, only two Courts of Appeals have dealt with the FHA's statute of limitations in design and construction cases. Thus, there is hardly a mature conflict among the courts of appeals, and the Supreme Court is unlikely to hear the question until that changes.

230. *Kuchmas v. Towson Univ.*, 553 F. Supp. 2d 556, 562 (D. Md. 2008).

231. *Id.* at 563.

232. Of course, in the case of an ongoing pattern or practice by an architect of construction firm of designing or building noncompliant structures, the continuing violations doctrine can be appropriately invoked against those ongoing actions. See *Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, No. C 06-5125 SBA, 2009 WL 2982840, at *4 (N.D. Cal. Sept. 14, 2009) ("*Garcia* did not eliminate the continuing violations doctrine in all [FHA] cases. Rather, *Garcia* simply held that there was no continuing violation because the tenant was not claiming that there were any ongoing unlawful acts, . . . [such as] continued construction of non-compliant complexes.").

233. See generally *Garcia v. Brockway*, 503 F.3d 1092 (9th Cir. 2007), cert. denied sub nom., *Thompson v. Turk*, 129 S. Ct. 724 (2008).

VI. CONCLUSION

Determining the appropriate limitations trigger for design and construction claims under the FHA has proved to be a daunting task. This Note has examined the three general approaches lower courts and courts of appeals have taken in dealing with the issue and some of the gray areas in between. In so doing, arguments in favor of each have been advanced, and an ultimate solution has been proposed: hold the original architects and builders to a strict two-year statute of limitations, commencing on the completion of the design and construction phase. The flip-side of that solution proposes that, in keeping with the broad remedial intent of the FHA, the current owners and operators should be held liable for the continuing inaccessibility of a structure's noncompliant design and construction. This approach strikes a balance between disabled residents seeking accessible housing and architects and builders seeking finality for their past non-compliant design and construction. Obviously, a better solution to this problem would be legislative clarification or hearing by the Supreme Court. The best solution, however, and one that is hopefully near, is willing compliance with the FHA's design and construction requirements and the HUD guidelines for implementing them.